28904 SERVICE DATE - FEBRUARY 5, 1998
SEC

SURFACE TRANSPORTATION BOARD[1]

No. 40875

CHEVRON CHEMICAL COMPANY
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: February 2, 1998

By complaint filed October 30, 1992, Blackburn Industries, Inc. (Blackburn), seeks a refund of alleged overcharges[2] of $75,505.30, plus interest, on behalf of its client, Chevron Chemical Company (Chevron), from Southern Pacific Transportation Company (SP),[3] for 79 rail car shipments of dry plastics from Eldon, TX, to St. Louis, MO (and stations in the switching limits), and to stations at Jacksonville and Jerseyville, IL. These shipments allegedly moved from 1988 to 1991. The ICC served a notice of complaint and copy of the complaint on SP on December 9, 1992. On January 11, 1993, SP answered the complaint. On February 23, 1993, Woodrow E. Jones, Blackburn's accounts manager, filed a statement on behalf Chevron.[4] On April 29, 1993, SP replied. On May 19, 1993, Mr. Jones filed a rebuttal statement.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11101 and 11704. Therefore, this decision applies the law in effect prior to the ICCTA.

[2] All of the claims rely on the same issue of tariff interpretation. At issue is whether a rate published in Item 17382 in Tariff ICC SWFB 3354-E that applies on carload shipments of synthetic plastics, other than liquid, from Houston, TX, to Jacksonville, IL, also applies from Eldon, TX, as an intermediate origin.

[3] This complaint was filed against "Southern Pacific Railroad", not "Southern Pacific Transportation Company." A complaint "must contain the correct, unabbreviated names and addresses of each complainant and defendant." 49 CFR 1111.1(a). Mr. W.E. Jones, in his statement filed February 23, 1993 on behalf of Blackburn, requested that defendant's name be stated correctly as Southern Pacific Transportation Company. On March 8, 1993, a notice to the parties was served correcting defendant's name.

[4] SP states that it did not receive Chevron's statement, dated February 16, 1993, until April 16, 1993.

Defendant requests that the complaint be dismissed, because, inter alia: (1) not all necessary parties have been properly joined; (2) none of the facts alleged have been verified and therefore cannot be accepted as evidence; and (3) some of the claims are barred by the statute of limitations of 49 U.S.C. 11706(b).

The complaint will not be dismissed at this time. The record will be reopened, however, to address the joinder issue, and to clarify certain matters. First, given the time that has passed since this proceeding was initiated, the parties are requested to advise the Board whether a dispute remains or whether the case has been settled or otherwise resolved. If complainant[5] still wishes to pursue this matter, the parties will be allowed to update the record and are also requested to address specific issues.

Representation/Verification. In the complaint, Blackburn states that it is "a freight auditing company under contract with Chevron" and that it "is filing on behalf of our client Chevron Chemical Company, P.O. Box 5048, San Ramon, California 94582, Attn[:] Charles McDonald . . . ." It appears that a copy of the complaint was sent to Mr. McDonald. In complainant's rebuttal, Mr. Jones is listed as the "Representative for Complainant."

Under the pertinent rules of practice, a complaint does not have to be verified if it is filed by an attorney or a practitioner. If the complaint is not signed by an attorney or practitioner, then, under 49 CFR 1104.4(b)(3), it must be

> Verified, if it contains allegations of fact, under oath by the person, in whose behalf it is filed, or by a duly authorized officer of the corporation in whose behalf it is filed. If the pleading is a complaint, at least one complainant must sign and verify the pleading.

Our records do not list Mr. Jones as a practitioner, and there is no indication that he is an attorney. Blackburn is asked to explain its relationship with Chevron, and whether it has the consent of Chevron, and the standing, to file the complaint. Also, information should be provided as to whether Mr. Jones is an attorney or practitioner. If he is not, then complainant must supply appropriate verification (verification by a representative of Chevron) or the complaint will be dismissed.

Shipment dates/Overcharges. There are a number of factual matters that must also be clarified. While complainant states that the shipments moved in 1988-1991, the actual dates of the

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[5] It is not altogether clear whether Blackburn or Chevron is the complainant in this proceeding, and this decision solicits information about their relationship. Thus, while the term "complainant" is used in this decision to refer to either or both of them, the use of the term in this decision does not constitute a determination as to the status of either entity.

movements are not provided. Also, complainant has provided different figures for the number of shipments at issue.[6] Complainant is requested to specify the number and the dates of movements and indicate whether the amount of overcharges sought is the same.

Statute of limitations. In its answer, SP maintains that recovery of the alleged overcharges for some of the shipments is barred by the statute of limitations under 49 U.S.C. 11706(b), which provides that a complaint must be brought within 3 years after the claim accrues.[7] Chevron argues that its August 10, 1992 request for an informal opinion from the ICC tolled the statute.

Under 49 CFR 1130.2(f), an informal complaint tolls the running of the statute, and if the informal complaint cannot be disposed of, or if the Board denies the relief sought, a formal complaint may be filed within six month after the Board notifies the parties in writing. Because Chevron requested an informal opinion, and did not file an informal complaint, its action did not toll the statute.

However, section 11706(d) extends the limitation period "for 6 months from the time written notice is given to the claimant by the carrier of disallowance of any part of the claim specified in the notice if a written claim is given to the carrier" within the limitation period. In this regard, SP claims that Blackburn originally filed an overcharge claim on behalf of Chevron with SP on April 11, 1991. Blackburn submits that it actually filed a claim on behalf of Chevron on January 19, 1990, and that SP denied all claims in July 1992.

Accordingly, the parties are requested to comment on when the overcharge claims with Chevron were filed and when they were denied. With this information, and with the information of the specific dates of the shipments, the Board will be able to clarify what, if any, claims are barred by the statute of limitations.

Fourth Section Order. SP contends that Item 217 of Tariff SWFB 3354-E provides that rates applying from or to Houston, TX, will also apply from or to Baytown, TX, except as otherwise provided. Item 217 is allegedly subject to Reference F66, which is identified as Commodity Rates From or to Baytown, Tex, Fourth Section Order No. 20459 (ICC served June 4, 1974). This order

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[6] As noted, the complaint listed 79 shipments. In the rebuttal statement, the number of movements listed was reduced to 59. This reduction is not fully explained, but appears to represent the deletion of movements to Illinois stations.

[7] Subsection 11706(g) provides: "A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the carrier." Subsection 11706(d) provides an additional 6-month extension to this time period. The 6-month period begins to run from the date of "notice" by the carrier that the claims have been denied.

and Items 90 and 90.5 of the tariff,[8] according to SP, allowed equalization of the Houston and Baytown rates and permitted maintenance of higher rates from or to intermediate points.

It should be noted, however, that the 1974 fourth section order allows the maintenance of higher rates from and to intermediate points "in those instances where departures from the long-and-short haul provision of section 4 of the Interstate Commerce Act lawfully exist on the date of this order in point-to-point commodity rates . . . ." SP is asked to identify a tariff or a fourth section order that authorized maintenance of higher rates to intermediate points at the time the 1974 order was issued.

Joinder. SP argues that complainant failed to join essential parties to the complaint, the other railroads on the routes. In its rebuttal, complainant added the St. Louis Southwestern Railway Company (SSW) as a party to the complaint (although it is unclear whether SSW was served with any of the pleadings in the case). In any event, the complaint will not be dismissed in light of the decision in Ford Motor Co. v. I.C.C., 714 F.2d 1157 (D.C. Cir. 1983) (Ford), where the court found that joinder of all parties in a reparations complaint was not statutorily required, and that, while the ICC could establish such a joinder rule, the parties must have fair notice of this change. See also General Electric Co. v. Delaware and Hudson Railway, No. 37010 (ICC served May 4, 1987).[9] Our records do not indicate that the ICC ever gave notice that it would follow a policy contrary to Ford.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The parties are to indicate 25 days from service of this decision whether they desire the Board to proceed with this complaint. If the controversy has not been resolved, complainant's supplemental statement will be due 40 days from service, defendant(s) reply will be due 60 days from service, and complainant's rebuttal will be due 20 days thereafter.

2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

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[8] Items 90 and 90.5, SP contends, exclude application of the intermediate rules of Items 80 and 85.

[9] We also note that the joinder rule found at former 49 CFR 1131.6 was deleted in Removal of Obsolete Regulations, STB Ex Parte No. 572 (STB served Sept. 29, 1997).

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